

Fences should control cattle — not keep out recreationists

By James Goetz - 03/29/2007

In a guest editorial in The Standard March 16, Steve Roth, president of the Montana Stockgrowers Association, attempts to demonize the Montana Department of Fish, Wildlife & Parks, accusing that agency of creating an “unnecessary strain” on landowner and recreationist relationships in Montana. Roth attacks Senate Bill 78 as unnecessary and as a measure that will not solve the issue of stream access at county road bridge sites.

In the mid-1980s, I represented the Montana Coalition for Stream Access in two cases that established the right of recreationists to use Montana’s streams. The Montana Supreme Court interpreted Article IX, Section 3 of the Montana Constitution (“All ... waters within the boundaries of the state are the property of the state for the use of its people”). It held that a single riparian landowner such as Mike Curran on the Dearborn River does not have the right to block the public’s right of floatage. Even before those cases, Montana had a long history of public use of its rivers and streams.

After we won the two stream access decisions, responsible agricultural groups such as the Montana Stockgrowers Association worked closely with recreation groups to accomplish passage of stream access legislation. Despite some fringe group Chicken Little predictions (boaters would be navigating a rancher’s irrigated alfalfa fields, for example), the law has worked well. Although not perfect, recreationists and ranchers have largely continued to get along.

The Montana Stockgrowers deserve a great deal of credit for their compromise efforts in the 1980s. However, Roth’s proprietary claim to Montana’s stream access law is a little sanctimonious. The stockgrowers came to the table only after we gained the two court victories on the Dearborn and Beaverhead rivers, which were strikingly broad. It was truly the recreationists who made the major compromises when the stream access legislation was passed.

Roth unfairly blames Fish, Wildlife & Parks, accusing it of bringing on this problem regarding bridge access. That is plainly not true. The problem began when a wealthy non-resident landowner on the Ruby River installed a five-string electrified fence across a bridge right of way. Although it was subsequently removed because of the public outcry, no one would argue with a straight face that such fence was necessary to control cattle. This activity is what brought on this controversy — not some agenda of the Department of Fish, Wildlife & Parks.

Roth argues that there are many areas where fences are attached to bridges. Fences do, of course, serve legitimate purposes, but not when the fence is used for an offensive weapon. For example, in the ’80s, Curran tried to string a fence across the Dearborn River — not to control his cattle but to harass floaters. That didn’t last long. As for those landowners who have historically used fences legitimately for purposes of controlling their cattle, **SB78 protects them by “grandfathering in” their existing fences, as long**

as they meet the definition of "legal fence." Recreationists will have the right to cross those fences within the public right of way, but the landowner has the right to keep his fence. Further, landowners willing to improve public access while protecting their fencing may even be reimbursed for their efforts.

Roth argues that SB78 "takes" private property adjacent to county bridges. His premise is that the riparian landowner owns to the bridge abutment, to the exclusion of the public. In fact, the state owns easements associated with county roads and these easements are held in trust for the public.

Look at any county road right of way in Montana and you will see the endless purposes for which they are used by the public — parking cars, piling snow, installation of utilities, sidewalks, stop lights, irrigation ditches. Many members of the public have traditionally used these easements for right of way to access a river or stream. The Montana attorney general held seven years ago that "the public may gain access to streams and rivers by using the bridge, its right of way and its abutments." So let's put an end to this "takings" nonsense.

Roth argues that SB78 will foster litigation, but he ignores the fact that there is litigation now on the Ruby River because the landowner has erected fencing, not for the purpose of keeping cattle in, but for the purpose of keeping recreationists out. **SB78 is designed to resolve the problem, not increase litigation.**

As a reasonable accommodation between the rights of the landowners and the rights of the recreating public, SB78 should be supported.

— James Goetz, a Bozeman attorney, successfully represented recreationist groups in the 1980s in the stream access cases on the Dearborn and Beaverhead rivers. His partner, Devlan Geddes, currently represents a recreationist group regarding fence issues on the Ruby River in Madison County.